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IN THE

Supreme Court of the United States

MICHAEL LEWIS AND TAMMY LIVINGSTON, PETITIONERS

v.

CITGO PETROLEUM CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENNIS P. DERRICK
7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610

MARIOS N. KARAYANNIS
Counsel of Record
Brady & Jensen, LLP
2425 Royal Boulevard
Elgin, IL 60123
(847)695-2000

CURRY & TAYLOR ♦ (202) 393-4141

QUESTIONS PRESENTED

1. Did the district court's entry of summary judgment against petitioners without considering their expert opposition evidence or making a *Daubert* inquiry on the admissibility of this evidence deny them due process?

2. Did the federal courts misapply summary judgment procedure by deciding against petitioners, the parties opposing summary judgment, crucial fact questions about whether their injuries were causally related to respondent's conduct?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 5

REASONS FOR GRANTING THE PETITION 13

CONCLUSION 26

APPENDIX

Circuit Court of Appeals Opinion 1a
District Court Memorandum Opinion & Order 21a
District Court Judgment 31a
Order Denying Rehearing 32a

TABLE OF AUTHORITIES

Page

CASES

ANDERSON V. LIBERTY LOBBY, 477 U.S. 242, 249-255(1986) 25
ARNETT V. KENNEDY, 416 U.S. 134, 142-146(1974) 22
BEARD V. BANKS, 548 U.S. 521, 534(2006) 23, 25
BITLEY V. A.O. SMITH CORP., 400 F.3RD 1227, 1235(10TH CIR. 2004) 20
BOARD OF REGENTS V. ROTH, 408 U.S. 564, 571-572(1972) 24
CAVALLO V. STAR ENTERPRISE, 100 F.3D 1150, 1158-1159(4TH CIR. 1996) 18
CELOTEX CORP. V. CATRETT, 477 U.S. 317, 326(1986) 22
CLAAR V. BURLINGTON NORTHERN R. CO., 29 F.3D 499, 501-503(9TH CIR. 1994) 18
CORTES-IRIZARRY V. CORPORACION INSULAR, 111 F.3D 184, 188-189(1ST CIR. 1994) 17, 18
DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC., 509 U.S. 579(1993) 10, 13, 15
DEAL V. HAMILTON COUNTY BD. OF EDUC., 392 F.3D 840, 852(6TH CIR. 2004) 20
DHILLON V. CROWN CONTROLS CORP., 269 F.3D 865, 869-871(7TH CIR. 2001) 18
DURA AUTOMOTIVE SYSTEMS OF INDIANA V. CTS CORPORATION, 285 F.3D 609, 617-619(7TH 17, 20
FOUNTAIN V. FILSON, 336 U.S. 681, 683(1949) 22
FRYE V. UNITED STATES, 293 F. 1013, 1014(D.C. CIR. 1923) 13
IN RE PAOLI R.R. YARD PCB LITIGATION, 916 F.2D 829, 854-855(3RD CIR. 1990) 21
KIRSTEIN V. PARKS CORP., 159 F.3D 1065, 1067(7TH CIR. 1998) 18
KUMHO TIRE CO., 526 U.S. 150 ..... 15, 21
KUMHO TIRE CO. V. CARMICHAEL, 526 U.S. 137 14
MEMPHIS LIGHT, GAS & WATER DIV. V. CRAFT, 436 U.S. 1,13-14(1978) 22, 24

MULLANE v. CENTRAL HANOVER TR. CO., 339 U.S. 306, 314(1950) 22
NELSON v. TENNESSEE GAS PIPELINE CO., 243 F.3D 244, 248-249 (6TH CIR. 2001) 18
REEVES v. SANDERSON PLUMBING PRODUCTS, INC., 530 U.S. 133, 150-151(2000) 25
ROCK v. ARKANSAS, 483 U.S. 44, 61(1987) 16, 20
SOUTH FLA. WATER MANAGEMENT DIST. v. MICCOSUKEE TRIBE, 541 U.S. 95 (2004) 23
UNITED STATES v. DOWNING, 753 F.2D 1224, 1242(3RD CIR. 1985) 15
WARD v. MONROEVILLE, 409 U.S. 57, 61-62(1972) 24
WILLNER v. COMMITTEE ON CHARACTER AND FITNESS, 373 U.S. 96, 103-104(1963) 24
WITHROW v. LARKIN, 421 U.S. 35, 46-47(1975) 24

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332(A)(1) 2, 10
28 U.S.C. § 2101(C) 2

RULES

FED. R. CIV. P. 1 ..... 3, 22
FED. R. CIV. P. 50(A) 16
FED. R. CIV. P. 56 16
FED. R. CIV. P. 56(C) 3
FED. R. CIV. P. 56(E)(2) 22
FED. R. EVID. 104(A) 4, 14
FED. R. EVID. 401 15
FED. R. EVID. 702 ..... 4, 10, 11, 12
FED. R. EVID. 703 ..... 5, 6, 7, 8

OTHER AUTHORITIES

MARGARET A. BERGER, PROCEDURAL PARADIGMS FOR APPLYING THE DAUBERT TEST, 78 MINN. L. REV. 1345, 1352 ..... 17, 18

OPINIONS BELOW

The published opinion of the Court of Appeals for the Seventh Circuit in *Michael Lewis and Tammy Livingston v. Citgo Petroleum Corporation*, C.A. No. 08-1483, dated April 6, 2009, and reported at 561 F.3d 698(7th. Cir. 2009), affirming the district court's grant of summary judgment in favor of respondent, is set forth in the Appendix hereto(App. 1-20).

The published opinion of the U.S. District Court for the Northern District of Illinois, Eastern Division, Bucklo, J., in *Michael Lewis and Tammy Livingston v. PDV America, Inc. Citgo Petroleum Corporation, and Citgo Lemont Refinery*, C.A. No. 06-C-4314, dated January 30, 2008, and reported at 532 F. Supp. 2d 1006(N.D. Ill. 2008), granting summary judgment in favor of respondents, is set forth in the Appendix hereto(App. 21-31).

The unpublished Order of the United States Court of Appeals for the Seventh Circuit in *Michael Lewis and Tammy Livingston v. Citgo Petroleum Corporation*, C.A. No. 08-1483, filed July 23, 2009, denying the petitioner's petition for rehearing or for rehearing *en banc*, is set forth in the Appendix hereto(App. 32).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit affirming the District Court's grant of summary judgment was entered on April 6, 2009(App. 1-20). Its further order denying petitioner's timely filed petition for panel rehearing or

for rehearing *en banc* was filed and decided on July 23, 2009(App. 32).

This petition for writ of certiorari is filed within ninety (90) days of July 23, 2009. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person...shall be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. § 1332(a)(1):

> **(a)** The district courts shall have original jurisdiction of any civil actions where the matter in controversy exceeds the sum of $75,000.00, exclusive of interests and costs, and is between--
>
> **(1)** citizens of different States....

Fed. R. Civ. P. 1:

> [The federal rules of civil procedure] ...shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 56(c), (d)(1) and (e)(2):

> **(c). Serving the Motion; Proceedings.**
> ....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> **(d) Case Not Fully Adjudicated on the Motion.**
> (1) *Establishing Facts.* If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court...should then issue an order specifying what facts—including items of damages or other relief----are not genuinely at issue....
>
> **(e)(2). Affidavits; Further Testimony.**
> ....*Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule-

set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Fed. R. Evid. 104(a) and (b):

> **(a) Questions of admissibility generally.**
> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
> **(b) Relevancy conditioned on fact.**
> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Fed. R. Evid. 702:

> **Testimony By Experts.**
> If scientific, technical, or other specialized knowledge will assist the trier of fact, to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods,

and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 703:

> **Bases of Opinion Testimony By Experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

STATEMENT

On March 11, 2001, petitioners Michael Lewis ("Lewis" or "petitioner") and Tammy Livingston ("Livingston" or "petitioner") were working as pipe fitting contractors at an oil refinery owned and operated by respondent Citgo Petroleum Corporation ("Citgo" or "respondent") in Lemont, Illinois(App. 1-2;21-22). Before petitioners began work on a given part of respondent's pipeline, Citgo employees were responsible for properly closing out the pipes where petitioners' pipefitting work was to be performed and

to give petitioners the "all clear" so they could proceed with their pipe fitting work.

Having received the "all clear" from Citgo employees that their pipefitting work could begin, petitioners opened one of the pipes in their work area located on an elevated outdoor platform. As they did so, hydrogen sulfide gas was released, injuring petitioners(App. 1;22). Lewis fell on the platform as a result of the blast of gas(App. 22). Both petitioners together with Citgo workers immediately left the platform(*Id.*) Once on the ground, petitioners received treatment at the refinery from both Citgo emergency and local first response personnel(*Id.*). They were then taken by ambulance to the emergency room of a local hospital where they were physically examined and then released, returning to work the next day(*Id.*)

Citgo's subsequent investigation showed that a so-called "CV-398" valve should have been locked out----but was not----prior to petitioners beginning work. Locking out this valve was the responsibility of Citgo employees and petitioners' exposure to this hydrogen sulfide gas would have been avoided had respondent's employees locked out this valve.

The investigation also revealed that a so-called "flare blind" should have been----but was not—placed on the flare line by respondent's employees and that this would also have prevented the hydrogen sulfide from being expelled and injuring petitioners when they breathed in these chemical fumes. Citgo's own Safety Director agreed that petitioners' exposure to this highly dangerous gas would not have taken place if Citgo's employees had properly locked out the CV-398

valve or if they had properly placed the flare blind on the flare line.

In May of 2001, petitioners filed workers' compensation claims with the Illinois Industrial Commission(App. 22-23). Lewis described his injuries stemming from the incident principally as headaches and "ongoing breathing difficulties including shortness of breath and difficulty breathing" (App. 23). He also characterized his injuries as possibly "occupational asthma," to be confirmed upon further testing(*Id.*). Livingston likewise described her principal injuries as "severe headaches and ongoing breathing difficulties" which could also be characterized upon further testing as "occupational asthma, or some like condition."

In March of 2003, petitioners filed their initial civil action against Citgo in the Illinois State courts seeking compensatory damages on account of Citgo's negligence(App. 3). In preparation for trial, petitioners retained two physicians, Drs. Jordan Fink and Norman Kohn, to evaluate their medical conditions(App. 3). Fink is a physician board certified in both internal medicine and allergies(*Id.*). He examined petitioner Lewis and opined that his exposure to hydrogen sulfide at work in March of 2001 caused him to contract the occupational asthma which presently afflicts him(*Id.*). As for Livingston, Fink concluded after his examination that her chemical exposure in March of 2001 had caused "a bronchitic problem" and possible sinus disease(*Id.*). He suggested that both petitioners consult with a "neuropsychiatry specialist" to determine whether their exposure to hydrogen sulfide had caused any deleterious effects to their nervous systems(*Id.*).

Several months later, on November 3, 2003, Dr. Kohn, a practicing psychiatrist board certified in neurology, examined both petitioners(*Id.*). He found that Lewis suffers from recurrent headaches but no permanent organic brain injury(App. 3-4). Kohn's opinion was that these headaches were most likely caused by stress together with the "direct and indirect *sequelae* of the workplace incident of March 2001"(*Id.*). After examining Livingston, Kohn found that she suffered from persistent headaches and post-traumatic stress which has led to the disruption of her daily activities; and he believed that these ailments were caused by the work incident in March 2001(App. 4).

Kohn diagnosed Livingston with potential emotional distress and reported that "[w]hile she minimizes her [workplace] experience [of being exposed to the hydrogen sulfide] now, she very likely suffered posttraumatic stress disorder (PTSD) in the earlier phases"(*Id.*). He further found that Livingston's problem was exacerbated by "an underlying mood disorder, most likely Bipolar Type II"(*Id.*).

Citgo countered with its own experts regarding petitioner Lewis' pulmonary injuries and petitioner Livingston's emotional injuries(App. 3). Dr. Terrence Moisan, a medical doctor, examined petitioners and believed that they were exposed to a significant amount of hydrogen sulfide in the incident of March, 2001. However, his opinion was that Lewis' asthma may have pre-existed the incident and that his exposure may only have caused a temporary aggravation of this condition(*Id.*). Dr. David Cugell, a pulmonary "expert," also examined Lewis on behalf of Citgo and concluded that while exposure to hydrogen sulfide can lead to

occupational asthma, Lewis did not suffer any lung injury. However, Gugell agreed that Lewis showed "some symptoms" as the result of his exposure to this dangerous gas.

Citgo also hired Dr. Jerry Sweet to examine petitioner Livingston regarding her emotional injuries(App. 3). He disagreed with Dr. Kohn's assessment that she suffered from post traumatic stress as a result of the incident; he thought she only suffered anxiety as a result of her exposure. In addition, Sweet believed Livingston's anxiety was a continuing symptom and could possibly be permanent.

Unlike petitioners' expert proof, however, *none* of Citgo's expert medical evidence addressed petitioner Lewis' emotional injuries or petitioner Livingtson's pulmonary injuries and whether these injuries were caused by their exposure to hydrogen sulfide in March of 2001.

In April of 2006, petitioners voluntarily dismissed their initial suit in the Illinois State courts and two months later began this civil action against respondent Citgo in the Circuit Court of Cook County seeking both compensatory and punitive damages arising from their exposure to hydrogen sulfide gas which they claimed was due to Citgo's negligence(App. 4). Petitioners also named PDV America, Inc. and Citgo Lemont Refinery as additional defendants in this civil action but neither of these defendants was ever served and both of then were eventually stricken as parties, leaving Citgo as the remaining defendant in this suit(App.19-20). Relying upon diversity of citizenship,

28 U.S.C. § 1332(a)(1), Citgo removed the case to the federal court for the Northern District of Illinois(*Id.*).

In forming their complaint against Citgo in their second suit, petitioners relied upon the proof of their experts Drs. Fink and Kohn, opinions already obtained during the course of their depositions in the first suit, to establish a causative link between Citgo's negligence and their injuries(App. 3). During the course of pre-trial discovery, no hearings were ever held, no motions *in limine* were ever brought and no inquiry was ever undertaken by the trial court to assess the admissibility of this expert evidence under Fed. R. Evid. 702 and this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579(1993).

However, after some discovery, Citgo moved for summary judgment in its favor under Rule 56, challenging the reliability and admissibility of the affidavits, deposition testimony and reports of Drs. Fink and Kohn regarding causation(App. 21;24-26). It argued that this evidence did not pass muster under Fed. R. Evid. 702 because it was not reliable and would not help the trier of fact in understanding the evidence or determining a fact at issue in the case(App. 24-25). Specifically, Citgo's challenged Fink's qualifications as an internist, his lack of training in toxicology or epidemiology as well as his methodology, in concluding that petitioners' injuries were causally related to their exposure to hydrogen sulfide in March of 2001(App. 24-25).

As Citgo contended, Fink's opinion was "unreliable and uniformed" because he did not review petitioners' medical records prior to the 2001 incident

and did not have pertinent information about the concentration of hydrogen sulfide in petitioners' exposure(App. 25). As such, it characterized Fink's opinion as speculative "and based only on [petitioners'] own self-reported symptoms and [it] fail[ed] to provide general or specific causation"(App. 25). Citgo raised similar objections with regard to Dr. Kohn's testimony(*Id.*).

Petitioners argued in response that the district court, Bucklo, J., should not decide the admissibility of their expert's testimony on a summary judgment record but that, if it did, it should construe all of the facts, including the affidavits, deposition testimony and reports of Drs. Fink and Kohn, in the light most favorable to petitioners, the parties opposing summary judgment(App. 25-26). The district judge disagreed, calling the proffered deposition testimony of Fink and Kohn presumptively "inadmissible," requiring a showing by petitioners on this summary motion that it was admissible under Fed. R. Evid. 702 and *Daubert*, i.e., that it was reliable and would assist the trier of fact in understanding the evidence or determining a fact in issue in the case(*Id.*).

Because she did not think that petitioners had met this burden, the district judge considered *none* of the opposition proof of Drs. Fink and Kohn on causation in deciding Citgo's summary judgment motion(App. 26-29). Left with arguing that the testimony of Citgo's own experts as well as that of the treating physician Dr. Metrou created a genuine issue of material fact for trial about the cause of their injuries, petitioners were unable to convince the motion judge that Citgo's motion should be denied(App. 28-29). As the district judge

concluded, the medical effects of hydrogen sulfide are not within the knowledge of the ordinary person and petitioners----with their own experts already excluded by the motion judge-----failed to adduce any proof on this issue(App. 29).

The court of appeals unanimously affirmed the district court's grant of summary judgment for Citgo(App. 1-20). It ruled that the district judge did not abuse her discretion in excluding petitioners' expert proof on the issue of causation at the same time that it decided Citgo's motion for summary judgment challenging that proof(App. 9-14). It determined that the district court was not obligated to follow any particular form in judging the admissibility of petitioners' expert proof and that it could do so upon a summary judgment motion without a separate proceeding, i.e., a hearing on a motion *in limine*, addressing this precise issue(App. 9-10). Thus if a judge could consider the admissibility question of expert opinion *sua sponte* under *Daubert*, it could do so upon a motion for summary judgment(*Id.*).

The court of appeals also determined that Judge Bucklo properly implemented the criteria of Rule 702 and *Daubert* in upholding Citgo's challenges to the methodology of Drs. Fink and Kohn, especially because petitioners "failed to advance any arguments in support of their experts"(App. 13-14). As the court concluded, petitioners

> did not suggest that Fink was qualified to render an opinion in this case or that Fink and Kohn based their conclusions on anything other than speculation. Instead, they chose to argue solely

> on the aforementioned procedural ground----that it was improper for CITGO to challenge the admissibility of their experts' testimony in a summary judgment motion----an argument which we have already dispatched.
>
> Presented with substantive arguments from only one side, the district court was well within its discretion to review the record and agree with CITGO's basic contention that the [petitioners] had failed to meet their burden to establish the admissibility of their evidence.

(App. 14).

On July 23, 2009, the court of appeals denied petitioner's petition for rehearing or for rehearing *en banc*(App. 32).

REASONS FOR GRANTING THE PETITION

1. The Entry of Summary Judgment Against Petitioners Without Making A *Daubert* Inquiry On The Admissibility Of Their Expert Evidence Denied Petitioners The Process Due Them Under The Federal Rules.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579(1993), this Court held that district courts must act as "gatekeepers" to protect juries from misleading or unreliable expert testimony by assessing the reliability of the expert's principles and methodologies used to reach the expert opinion or conclusion. *Id.* at 589-592. Rejecting the test enunciated in *Frye v. United States*, 293 F. 1013, 1014(D.C. Cir. 1923) for assessing expert evidence, it adopted a two-

step inquiry for the admissibility of scientific evidence contained in the Federal Rules of Evidence104(a) and 702. *Id.* at 592-593.

First, the district court must determine if the expert's proffered testimony----whether it concerns scientific, technical or other special knowledge----has "a reliable basis in the knowledge and experience of his [or her] discipline." *Id.* at 592. See also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149(1999)(*Daubert's* principles apply to all expert matters identified in Rule 702). By conducting a preliminary inquiry into the expert's qualifications and the admissibility of proffered evidence, a district court fulfills its initial obligation under Rule 104(a)("Preliminary questions concerning the qualification of a person to be a witness...or the admissibility of evidence shall be determined by the court.").

In this initial inquiry, the district judge determines "whether the reasoning or methodology underlying the testimony is scientifically valid and...whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-593. The goal is reliability and in assessing the reliability of expert testimony pursuant to Rule 702, the district judge can consider *inter alia* whether a theory has been or can be tested or falsified; whether the theory or technique has been subject to peer review and publication; whether there are known or potential rates of error with regard to specific techniques; and whether the theory or approach has "general acceptance." *Id.* at 593-594.

The purpose of this inquiry is to ensure that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co.*, 526 U.S. 150;152-153. As the *Daubert* Court concluded,

> [t]he inquiry envisioned by Rule 702 is...a flexible one. Its overarching subject is the scientific validity----and thus the evidentiary relevance and reliability-----of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

509 U.S. at 594-595(footnote omitted).

Second, in fulfilling his or her *Daubert* obligations, the district judge must also conduct a further inquiry into whether the proposed testimony is "sufficiently tied to the facts of the case that it will aid the jury in resolving the factual dispute, i.e., is "sufficiently relevant to the task at hand." *Daubert*, 509 U.S. at 591;597. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The inquiry is one of "fit," the logical relationship between the proffered proof and the material issue it is supposed to support in order to judge whether it will help the trier of fact. *Id.* at 591 citing *United States v. Downing*, 753 F.2d 1224, 1242(3rd Cir. 1985).

Addressing the concern that this two-step inquiry will lead to juries being confronted with unreliable quack science dressed up as scientific analysis, the *Daubert* Court observed:

> [v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. See *Rock v. Arkansas*, 483 U.S. 44, 61(1987). Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed. R. Civ. P. 50(a), and likewise to grant summary judgment, Fed. R. Civ. P. 56. Cf., *e.g.*, *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349(CA6)(holding that scientific evidence that provided foundation for expert testimony, viewed in the light most favorable to plaintiffs, was not sufficient to allow a jury to find it more probable than not that defendant caused plaintiff's injury)....
> *These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.*

Id. at 596. Thus a trial or a trial-like setting normally will provide the best operating environment for the analysis *Daubert* demands. A "*Daubert* inquiry" therefore can take on the dimensions of a full hearing

on a motion in *limine* challenging such proof, a proceeding amounting to *voir dire* or some such similar proceeding designed to elicit the foundations of the expert evidence in order to provide an opportunity for the district judge to assess the admissibility of such proof.

However, when a defendant challenges a plaintiff's expert evidence on causation for its failure to meet *Daubert's* standards in the context of defendant's motion for summary judgment, the district court still remains obligated to undertake the two-step *Daubert* inquiry but should do so with caution. *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184, 188-189(1st Cir. 1997). See *Dura Automotive Systems of Indiana v. CTS Corporation*, 285 F.3d 609, 617-619(7th Cir. 2002)(Wood, J., dissenting); Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345, 1352;1376-1381(1994).

As the court of appeals in *Cortes-Irizarry* observed:

> given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage.
> ...[A]t the junction where *Daubert* intersects with summary judgment practice, *Daubert* is accessible but courts must be cautious----except

> when defects are obvious on the face of a proffer---not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility.

111 F.3d at 188. *Accord*, Berger, *supra*, 78 Minn. L. Rev. at 1379-1380 ("Courts should avoid granting motions for summary judgment unless the parties have had a full opportunity *and incentives* to develop an adequate record during the discovery phase. Consequently, courts should require a motion in *limine* for admissibility objections to scientific proof and impose on the defendant an initial burden of production that insists on an affirmative demonstration of the inadequacies of the plaintiff's proof. The trial court will then have an adequate record for making a Rule 56 determination an the appellate court will have a far more suitable record for review.")(emphasis supplied).

Thus where a district judge conducts *Daubert's* two-step inquiry incident to a defendant's motion for summary judgment challenging plaintiff's expert evidence, an inquiry which allows the worth of the plaintiff's expert proof to be judged on a record fully developed by discovery, the entry of summary judgment presents no occasion for reversal. See, e.g., *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 869-871(7th Cir. 2001); *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 248-249 (6th Cir. 2001); *Kirstein v. Parks Corp.*, 159 F.3d 1065, 1067(7th Cir.1998); *Cavallo v. Star Enterprise*, 100 F.3d 1150, 1158-1159(4th Cir. 1996); *Claar v. Burlington Northern R. Co.*, 29 F.3d 499, 501-503(9th Cir. 1994).

However, where the district judge upon Citgo's motion for summary judgment attacking petitioners' expert evidence as speculative, immediately characterizes as "inadmissible" petitioners' expert opposition affidavits, deposition testimony and reports regarding the cause of their injuries and then *without a hearing* decides to disregard this opposition material entirely in deciding the summary judgment motion in respondent's favor, petitioners have been denied the process due them under this Court's decision in *Daubert* as well as by the Federal Rules of Civil Procedure(App. 25-26).

By disregarding altogether petitioners' expert opposition materials on causation because petitioners had not shown them to be admissible within the *Daubert* framework, the district judge turned the summary judgment protocol on its head. Instead of construing these opposition materials in the light most favorable to petitioners and construing the motion materials *against* respondent, as she was bound to do under Rule 56, Judge Bucklo ignored petitioners' opposition materials altogether as presumptively inadmissible and then decided the summary judgment motion solely on the basis of Citgo's flimsy, self-serving expert proof. This was a failure of process by the district court and a refusal to harmonize the mandate of *Daubert* with the summary judgment protocol so that petitioners received a fair opportunity in a *Daubert* hearing to adduce their admissible expert evidence, endowing it with the probative force it deserved on Citgo's motion for summary judgment.

Lost in this unfair process is the fact that respondent made *no showing at all* with their own

expert evidence that petitioners' expert proof was in any way invalid or somehow constituted "quack science." These were not elaborate, arcane cases of cause and effect for Dr. Fink, an experienced board certified internist and allergist who examined petitioners and determined that their symptoms were rooted in their earlier exposure to a very dangerous gas(App. 24-26). Nor were Dr. Kohn's opinions too attenuated to deserve their abrupt exclusion here. A seasoned practicing psychiatrist board certified in neurology, he had a supportable basis upon the histories given him to deduce that both petitioners carried injuries with them which stemmed from their exposure to hydrogen sulfide in 2001.

Their reasonable inferences and deductions about the cause of their patients' symptoms were admissible on their face with the weight of such proof to be ultimately determined by "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof..." *Rock v. Arkansas, supra.* See, e.g., *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 852(6th Cir. 2004); *Dura Automotive Systems of Indiana v. CTS Corporation*, 285 F.3d at 620(potential flaws in expert's opinion go to the weight, not the admissibility, of the evidence) (Wood, J., dissenting).

Nor was their methodology "quack science" but rather a time-honored calculus employed by physicians with patients presenting symptoms from past events, i.e., they *deduce* the probable cause of their patients' injuries. See *Bitley v. A.O. Smith Corp.*, 400 F.3rd 1227, 1235(10th Cir. 2004). Although such a method is not susceptible to testing or peer review, it does constitute

generally accepted practice as a method for physicians to identify the causes of their patients' maladies. See *Kumho Tire Co.*, 526 U.S. at 150 & 157("the relevant reliability concerns may focus upon personal knowledge or experience."). However, because the district court arbitrarily disregarded this expert opposition proof without a hearing and failed even to consider this evidence addressing causation in ruling on the summary judgment motion, petitioners were denied the probative force this evidence deserved and denied a fair hearing both on the *Daubert* issues and the summary judgment itself.

As the court of appeals observed in *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 854-855(3rd Cir. 1990),

> [a]n in *limine* hearing would have been quite manageable [to test the admissibility of plaintiff's expert evidence on causation]. At least some process should have been devised to afford plaintiffs a surrogate for that trial scenario where the equivalent evidentiary exclusion and adverse judgment might occur. On this ground alone, the summary judgment would have to be set aside.

Id. Some kind of hearing addressing the mandatory *Daubert* considerations should have preceded the district judge's abrupt rejection of petitioners' opposition affidavits, deposition testimony and reports by their medical experts and a failure to provide petitioners this process violates *Daubert*, Rule 56 protocol and fundamental notions of due process.

Rule 56 like all of the federal rules of civil procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. The right to adequate notice and the opportunity to respond are deeply embedded in the Federal Rules' concept of fair play and substantial justice. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14(1978); *Arnett v. Kennedy*, 416 U.S. 134, 142-146(1974); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314(1950). Rule 56, as interpreted by this Court, requires fair notice and an opportunity to respond.

Under Fed. R. Civ. P. 56(e)(2), the opposing party is *required* to come forward with affidavits or other positive proof setting forth specific facts showing a genuine triable issue and a failure to do so will result in summary judgment being rendered against that party. As early as *Fountain v. Filson*, 336 U.S. 681, 683(1949) and culminating with *Celotex Corp. v. Catrett*, 477 U.S. 317, 326(1986), the Court has read Rule 56's language to mean that before a district court can enter summary judgment, the party against whom the motion is brought must be given fair notice that this specific relief is being sought and must be given a meaningful opportunity "to come forward with all of [his] evidence." *Celotex, supra.* Petitioners were denied this fundamental right.

The *Celotex* Court reinforced these notions of notice and an opportunity to respond incident to a Rule 56 ruling by noting that while the district courts can enter summary judgment *sua sponte*,

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, *but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.*

477 U.S. at 326-327(emphasis supplied). See *Beard v. Banks*, 548 U.S. 521, 534(2006)(Rule 56(e) presumes notice and a meaningful opportunity to respond); *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95, 112-113(2004)(Scalia, J., concurring in part and dissenting in part) ("Nothing in *Celotex*...requires a district court to speculate *sua sponte* about possibilities even the parties have not contemplated.").

The district court's peremptory rejection of petitioners' expert opposition materials to Citgo's summary judgment motion and its refusal to provide petitioners a *Daubert* inquiry about their expert medical proof denied petitioners the process due them under *Daubert*, the federal rules of civil procedure and the due process clause of the fifth amendment to the federal constitution.

2. The Federal Courts Misapplied Summary Judgment Procedure By Construing All Fact Questions Against Petitioners, The Parties Opposing Summary Judgment, And By Denying Them The Persuasive Force Their Expert Proof Deserved.

Petitioners' cause of action and their right to have their claims fairly heard and decided in federal court is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572(1972). This Court has the ultimate authority about how the federal rules of civil procedure are implemented and a procedure which rejects petitioners' expert opposition materials to Citgo's summary judgment motion and refuses to provide a *Daubert* inquiry on this evidence is suspect because the procedure denies petitioner procedural due process, including adequate notice and a fair hearing on contested fact issues. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14(1978). *Withrow v. Larkin*, 421 U.S. 35, 46-47(1975). *Ward v. Monroeville*, 409 U.S. 57, 61-62(1972). *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104(1963).

In addition, in construing the materials adduced by the parties incident to respondent's motion for summary judgment, both the district judge and the court of appeals were bound to draw all reasonable inferences from these materials *against* Citgo as the moving party and *in favor* of petitioners as the non-moving parties; and they were also required to resolve all credibility questions in favor of petitioners, the non-moving parties because the role of the courts is only to determine whether there is a genuine issue of material

fact for trial. *Beard v. Banks*, 548 U.S. at 529-530. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151(2000). *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255(1986).

However, the courts below misapplied summary judgment procedure by deciding *against* petitioners on every crucial fact question about whether Citgo's negligence caused petitioners' exposure to hydrogen sulfide and their ensuing injuries, genuine jury questions central to petitioners' recovery. Indeed, because the district judge erroneously rejected petitioners' proffered proof on causation in its entirety, it had no difficulty concluding that petitioners had failed to adduce sufficient evidence to survive summary judgment under the standards announced by this Court in *Celotex* and *Anderson*.

This misapplication of Rule 56 procedure invokes the Court's power of superintendency over the federal courts and the federal system in order to reassert the lower courts' proper role in deciding summary judgment motions, i.e., reaffirming the holdings of *Beard*, *Reeves* and *Anderson* which require them to draw all reasonable inferences in favor of the party who opposes the motion for summary judgment and in order to give petitioners' expert evidence the probative force it deserves, to refrain from making credibility determinations in order to resolve material factual disputes since this is the function of a jury, not a judge. *Beard v. Banks*, 548 U.S. at 555(Ginsburg, J., dissenting).

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit and, ultimately, to vacate and reverse this judgment and remand the matter to the United States District Court for the Northern District of Illinois, with instructions that petitioners' claims against the respondent be tried to a jury; or provide petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Dennis P. Derrick
Seven Winthrop Street
Essex, MA 01929
(978)768-6610

Marios N. Karayannis
Counsel of Record
Brady & Jensen, LLP
2425 Royal Boulevard
Elgin, IL 60123
(847)695-2000

(any footnotes trail end of each document)
No. 08-1483

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL LEWIS and TAMMY LIVINGSTON,
Plaintiffs-Appellants,

v.

CITGO PETROLEUM CORPORATION,[1]
Defendant-Appellee.

December 5, 2008, Argued

April 6, 2009, Decided

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 06 CV 4314--Elaine E. Bucklo, Judge.

Before RIPPLE, KANNE, and TINDER, Circuit Judges.

OPINION

KANNE, *Circuit Judge.* Plaintiffs-appellants Michael Lewis and Tammy Livingston claim to have been injured when they were exposed to hydrogen sulfide gas while working at a refinery operated by the defendant, CITGO Petroleum Corp. They sued CITGO under theories of negligence, which required them to prove that the exposure caused compensable injuries.

On the defendant's motion for summary judgment, the district court found expert testimony offered by the plaintiffs on the element of causation to be inadmissible. Absent admissible proof of causation, the district court then granted summary judgment in favor of CITGO. For the reasons that follow, we affirm.

I. BACKGROUND

On March 11, 2001, Lewis and Livingston allegedly were exposed to hydrogen sulfide gas while fixing a flange at a refinery in Lemont, Illinois. Lewis and Livingston were employed by Philip Services Corporation, which had contracted with CITGO, the refinery's operator, to perform maintenance work at the facility.

On-site emergency personnel and a first-response medical team examined Lewis and Livingston before an ambulance took them to a local hospital. There, the emergency room staff conducted a full medical evaluation, including blood tests and chest x-rays. The hospital released both patients without an overnight stay.

Both Lewis and Livingston returned to work the next day. They received follow-up care from Dr. Bess Metrou, a physician for MedWorks, a healthcare provider for the refinery. Metrou met with Lewis and Livingston on three occasions in the ten days immediately following the accident. For the next two-and-a-half years, neither Lewis nor Livingston, both of whom are long-time smokers, sought further treatment for any medical problems purportedly related to the gas exposure.

In March 2003, the plaintiffs filed their initial suit against CITGO in Illinois state court. To prepare for trial, plaintiffs' counsel retained two physicians, Dr. Jordan Fink and Dr. Norman Kohn, to evaluate their clients' medical conditions. CITGO countered the diagnoses of doctors Fink and Kohn with a panel of its own experts, including Dr. Terrence Moisan, Dr. David Cugell, and Dr. Jerry Sweet. Although Lewis and Livingston voluntarily dismissed that suit in April 2006, the medical opinions of Fink and Kohn formed the basis of their subsequent 2006 action against CITGO, which is the subject of this appeal.

On August 7, 2003, Dr. Fink, a doctor of internal medicine who specializes in allergies, examined both Lewis and Livingston at the request of their attorney. Fink found Lewis to be in generally good health, but he diagnosed him with "occupational asthma related to exposure to chemicals at work during [the March 11] maintenance accident." Following his examination of Livingston, Fink stated that Livingston's chemical exposure in March 2001 had caused "a bronchitic problem" and possible sinus disease. Fink suggested that both Lewis and Livingston consult with a "neuropsychiatry specialist" to determine whether their purported exposure to hydrogen sulfide had caused deleterious effects to their nervous systems.

Pursuant to Dr. Fink's advice, several months later, on November 3, 2003, plaintiffs' counsel sent Lewis and Livingston to see Dr. Kohn, a psychiatrist and board-certified neurologist. In Lewis, Kohn found no evidence of "permanent organic brain injury." He noted that Lewis had recurrent headaches, with the "most likely causes [being] direct and indirect sequelae of the

workplace incident of March 2001." In Kohn's report on Livingston, he found that she had suffered persistent headaches since the accident but that she, like Lewis, suffered from no permanent organic brain injury. The doctor diagnosed Livingston with potential emotional distress, stating: "While she minimizes her experience now, she very likely suffered posttraumatic stress disorder [(PTSD)] in the earlier phases." He found this problem exacerbated by "an underlying mood disorder, most likely Bipolar Type II."

On June 22, 2006, two months after dismissing their first suit, nearly three years after doctors Fink and Kohn first examined them, and more than five years after the incident at the Lemont refinery, Lewis and Livingston filed a second action against CITGO in the Circuit Court of Cook County, Illinois. In their complaint, Lewis and Livingston sought both compensatory and punitive damages arising from their exposure to hydrogen sulfide gas, which they claimed was due to CITGO's negligence. Relying on diversity of citizenship, CITGO promptly removed the case to federal court.

In an order dated January 30, 2008, the district court granted CITGO's motion for summary judgment. The court noted that it could consider only admissible evidence when ruling on a summary judgment motion. The court then found that the plaintiffs, as the proponents of experts Dr. Fink and Dr. Kohn, had failed to satisfy their burden to demonstrate the reliability and usefulness of the evidence, a prerequisite for admitting expert testimony. The court therefore declined to consider their opinions in making its decision. Without that evidence, the court determined

that the plaintiffs had not presented admissible evidence that would create a triable issue of fact on causation, a necessary element of any successful negligence claim. The district court concluded that summary judgment was appropriate, and it is this order that Lewis and Livingston now appeal.

II. ANALYSIS

We review *de novo* a district court's decision to grant a party's motion for summary judgment. *Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 201 (7th Cir. 1994). If, after reviewing the record as a whole and drawing all reasonable inferences in favor of the nonmoving party, a court determines that there remains no genuine issue as to any material fact, then the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Alexander v. Wis. Dep't of Health & Family Servs.*, 263 F.3d 673, 680 (7th Cir. 2001). Thus, to survive summary judgment, the nonmoving party must present evidence sufficient to establish a triable issue of fact on all essential elements of its case. *See Celotex Corp.*, 477 U.S. at 322-23. If there is no triable issue of fact on even one essential element of the nonmoving party's case, summary judgment is appropriate. *Id.* at 323.

As a federal court sitting in diversity, we apply the substantive law of Illinois. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Schindler v. Seiler*, 474 F.3d 1008, 1010 (7th Cir. 2007). We construe the plaintiffs' remarkably inarticulate complaint as seeking relief based on two state law theories. The first, which both Lewis and Livingston

assert, is simple common law negligence. The second, which pertains to only Livingston, is the separate tort of negligent infliction of emotional distress.[2] As we discuss below, Illinois law treats the two claims similarly in certain situations.

To establish a valid claim for negligence in the state of Illinois, a party must demonstrate that the defendant owed him a duty, that the defendant breached this duty, and that he suffered an injury that was proximately caused by the defendant's breach. *Cunis v. Brennan*, 56 Ill. 2d 372, 308 N.E.2d 617, 618 (Ill. 1974). In the personal injury context, standard negligence claims involve physical injuries and those mental harms, commonly called pain and suffering, that "stem[ ] directly from a physical injury or condition." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994). As stated above, if CITGO can show that Lewis and Livingston have not produced evidence sufficient to create a triable issue of fact on any one of these elements, summary judgment is appropriate. *See Celotex Corp.*, 477 U.S. at 322-23.

Illinois law on negligent infliction of emotional distress is somewhat more complicated. In evaluating these claims, Illinois courts separate "bystanders" from "direct victims." *See Corgan v. Muehling*, 143 Ill. 2d 296, 574 N.E.2d 602, 605-06, 158 Ill. Dec. 489 (Ill. 1991) (recognizing the different tests applicable to bystanders and direct victims); *see also Kapoulas v. Williams Ins. Agency, Inc.*, 11 F.3d 1380, 1382 (7th Cir. 1993). Bystanders must satisfy the "zone-of-physical danger" test, which limits potential recovery to those individuals "'in a zone of physical danger and who, because of the defendant's negligence, [had] reasonable

fear for [their] own safety' which caused them emotional distress, and who could demonstrate physical injury or illness resulting from the emotional distress." *Kapoulas*, 11 F.3d at 1382 (alterations in original) (quoting *Rickey v. Chi. Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1, 5, 75 Ill. Dec. 211 (Ill. 1983)).

By contrast, a direct victim of alleged negligent infliction of emotional distress must satisfy the "impact" rule. *See Corgan*, 574 N.E.2d at 604-06. Under the impact rule, a direct victim may not recover for emotional distress suffered as a result of the defendant's alleged negligence unless the emotional distress "was accompanied by a contemporaneous physical injury to or impact on the plaintiff." *Rickey*, 457 N.E.2d at 2; *see also Corgan*, 574 N.E.2d at 605. Direct victims no longer need to suffer physical manifestations resulting from the emotional distress as a prerequisite to recovery; emotional injuries alone will suffice. *See Corgan*, 574 N.E.2d at 609.

As a result of these parallel analyses, classifying a claimant as either a bystander or a direct victim becomes important in determining whether potential recovery exists. *Kapoulas*, 11 F.3d at 1382. Under Illinois law, a claimant may be *both* a bystander and a direct victim. *See, e.g., id.* at 1384; *Seitz v. Vogler*, 289 Ill. App. 3d 1029, 682 N.E.2d 766, 774, 225 Ill. Dec. 22 (Ill. App. Ct. 1997). It is unclear from Livingston's complaint whether she is making a claim as a bystander, direct victim, or both. A close reading of the record, however, reveals insufficient facts or allegations to support a bystander claim under the aforementioned test.[3] Thus, we consider her allegations to be those of a direct victim.

Illinois courts treat claims by direct victims of negligent infliction of emotional distress under the same approach used for standard negligence claims. *See Corgan*, 574 N.E.2d at 606; *Hiscott v. Peters*, 324 Ill. App. 3d 114, 754 N.E.2d 839, 849-50, 257 Ill. Dec. 847 (Ill. App. Ct. 2001). In other words, a party advancing a negligent infliction of emotional distress claim must demonstrate a defendant's duty, as well as a breach that proximately caused the claimant an injury. *See Parks v. Kownacki*, 193 Ill. 2d 164, 737 N.E.2d 287, 296-97, 249 Ill. Dec. 897 (Ill. 2000). The difference under a claim for negligent infliction of emotional distress, of course, is that the alleged injury may be solely emotional, rather than physical. *See Corgan*, 574 N.E.2d at 609; *see also Gottshall*, 512 U.S. at 544 ("The injury we deal with here is mental or emotional harm . . . that is caused by the negligence of another and that is not directly brought about by a physical injury . . . ."). As with the plaintiffs' negligence claims, if CITGO can show that Livingston has not produced evidence sufficient to create a triable issue of fact on any one of the required elements--duty, breach, injury, or causation--summary judgment is appropriate on her claim for negligent infliction of emotional distress. *See Celotex Corp.*, 477 U.S. at 322-23.

The district court granted CITGO's motion for summary judgment based solely on the plaintiffs' inability to demonstrate a triable issue of fact on the necessary element of causation. We limit our initial discussion to causation before turning, in the context of negligent infliction of emotional distress, to a related question: the necessity of a compensable "effect," i.e., whether the purported emotional injuries were sufficiently egregious to survive summary judgment.

A. Causation Evidence from the Plaintiffs' Expert Witnesses

The plaintiffs sought to establish causation for all of their claims through the use of expert testimony offered by Dr. Fink and Dr. Kohn. To defeat a summary judgment motion, however, a party may rely only on admissible evidence. *See Schindler*, 474 F.3d at 1010; *Stinnett v. Iron Works Gym/Executive Health Spa, Inc.*, 301 F.3d 610, 613 (7th Cir. 2002); *Smith v. City of Chi.*, 242 F.3d 737, 741 (7th Cir. 2001). This rule applies with equal vigor to expert testimony. *See Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 612 (7th Cir. 1993) (noting that expert testimony must be admissible to be considered in a motion for summary judgment); *see also Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 320 (7th Cir. 1996) (affirming summary judgment when the district court declined to consider expert testimony that it found inadmissible). Thus, the first question that we must answer is whether the district court properly excluded the evidence presented by Fink and Kohn.

The appellants' initial challenge is procedural. Lewis and Livingston claim that the district court was required to consider questions pertaining to the admissibility of evidence separately from those related to the summary judgment motion. Specifically, the appellants argue that their experts' testimony remained admissible at the time of the summary judgment motion because CITGO did not first move to have it stricken. They assert that the court's decision to exclude the evidence, which it made concurrently with its order granting summary judgment, was therefore improper. We disagree.

Although it is rarely a dispositive question, we have repeatedly affirmed district courts that have made evidentiary rulings on proposed expert testimony in conjunction with summary judgment orders. *See, e.g.*, *Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 868, 871 (7th Cir. 2001); *Rosen*, 78 F.3d at 318, 320; *Porter*, 9 F.3d at 612, 616-17. The factors the district court must consider in determining the admissibility of expert testimony are well established, *see* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-95, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), but the law grants the district court great discretion regarding the manner in which it conducts that evaluation, *see Kirstein v. Parks Corp.*, 159 F.3d 1065, 1067 (7th Cir. 1998). In *Kirstein*, we noted that "[w]e have not required that the *Daubert* inquiry take any specific form and have, in fact, upheld a judge's *sua sponte* consideration of the admissibility of expert testimony." *Id.* (citing *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994)).

Given this precedent, it was entirely proper for the district court to determine the admissibility of the plaintiffs' expert testimony at the same time that it decided the defendant's motion for summary judgment. Further, given that the district court may consider the admissibility of expert testimony *sua sponte*, *see O'Conner*, 13 F.3d at 1094, 1107, it is of no import that CITGO objected to the expert testimony only in its motion for summary judgment, as opposed to first filing a separate motion in limine. Having found the appellants' procedural argument unavailing, we now turn to the substance of the district court's decision that the testimony of the plaintiffs' experts was inadmissible.

In cases where the district court based its decision to grant summary judgment on the exclusion of certain expert testimony, we review de novo whether the court employed the correct legal standard in reaching its admissibility decision. *Winters v. Fru-Con Inc.*, 498 F.3d 734, 742 (7th Cir. 2007). Once satisfied that it did, we review only whether the court abused its discretion in its "choice of factors to include within that framework as well as its ultimate conclusions regarding the admissibility of expert testimony." *Id.*

The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 607 (7th Cir. 2006). Expert testimony is admissible when the testimony is reliable and would assist the trier of fact to understand the evidence or determine a fact at issue in a case. *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 589-91. The proponent of the expert bears the burden of demonstrating that the expert's testimony would satisfy the *Daubert* standard. Fed. R. Evid. 702 advisory committee's note (2000 Amends.) ("[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."); *cf. Bourjaily v. United States*, 483 U.S. 171, 175 76, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) (holding that the proponent of hearsay evidence must prove to the court, by a preponderance of the evidence, that the Rules of Evidence have been satisfied).

Because it is clear from the district court's order that it applied Rule 702 and *Daubert*, we are satisfied that the court utilized the correct standard in conducting its analysis. Thus, we review the substance of the court's evidentiary decisions only for an abuse of discretion. *See Winters*, 498 F.3d at 742. Upon review, we conclude that the court was well within the bounds of its discretion in deciding not to consider the testimony of Fink and Kohn.

A party challenging the admissibility of expert testimony can take issue with both the qualifications and the methodology of the proposed expert. For a witness to be considered an "expert," Rule 702 requires that person to be qualified as such "by knowledge, skill, experience, training, or education." But it is not enough that the proposed testimony comes from a qualified physician. As we have said: "[Q]ualifications alone do not suffice. A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in *Daubert*." *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999); *see also Rosen*, 78 F.3d at 318 ("[A] district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist."). Instead, to be admissible, a medical expert's ultimate opinion must be grounded in the scientific process and may not be merely a subjective belief or unsupported conjecture. *See Daubert*, 509 U.S. at 589-90; *Goodwin v. MTD Prods., Inc.*, 232 F.3d 600, 608-09 (7th Cir. 2000).

In its motion for summary judgment, CITGO

challenged both Dr. Fink's qualifications and his methodology. CITGO argued that Fink was an allergist and had no training or experience in toxicology or epidemiology. CITGO noted that Fink had treated one patient twelve years earlier who had experienced hydrogen sulfide exposure, and, in preparing his diagnosis in this case, he spent only thirty minutes researching a medical database for relevant information about hydrogen sulfide exposure. CITGO also contested Fink's conclusions regarding both general and specific causation. It pointed to several notable gaps within Dr. Fink's cause-and-effect conclusions, which CITGO argued were based on mere speculation and therefore inadmissible.

In lodging complaints against Dr. Kohn, CITGO focused exclusively on Kohn's methodology. Kohn, who did not examine Lewis and Livingston until two-and-a-half years after the incident, conceded that Livingston did not have PTSD at the time of his evaluation, but stated that she "likely met criteria for [PTSD] at some point in the months following the accident." Kohn reached this conclusion based only on information gathered from Livingston herself; he did not examine her prior medical records. Additionally, Kohn diagnosed Livingston with an underlying mood disorder, which he opined was likely Bipolar Type II, yet he failed to support his conclusions related to the interplay of this underlying disorder and Livingston's past bout with PTSD. As to Lewis, Kohn found that the incident "triggered" his headaches. There again, however, he failed to consider and discount other potential causes, including many purported stressors that were occurring in Lewis's work and social lives.

Faced with CITGO's challenges, Lewis and Livingston, who bore the burden of proving the admissibility of their evidence, *see Bourjaily*, 483 U.S. at 175-76, failed to advance any arguments in support of their experts. They did not suggest that Fink was qualified to render an opinion in this case or that Fink and Kohn based their conclusions on anything other than speculation. Instead, they chose to argue solely on the aforementioned procedural ground--that it was improper for CITGO to challenge the admissibility of their experts' testimony in a summary judgment motion--an argument with which we have already dispatched.

Presented with substantive arguments from only one side, the district court was well within its discretion to review the record and agree with CITGO's basic contention that the plaintiffs had failed to meet their burden to establish the admissibility of their evidence. Our review of the record reveals no reason to disturb this conclusion. The district court did not abuse its discretion when it declined to consider the testimony of Dr. Fink and Dr. Kohn in rendering its summary judgment decision.

B. Causation Evidence from Other Medical Experts

Lewis and Livingston next contend that even if the district court properly ignored their experts' testimony, other material in the record provides the requisite evidence of causation needed to prevent summary judgment. In regard to their negligence claims, Lewis and Livingston point to reports and statements from the MedWorks doctor, Dr. Metrou, as well as those from two of CITGO's experts, doctors Moisan and

Cugell. As for Livingston's claim for negligent infliction of emotional distress, she refers us to evidence from another of CITGO's experts, Dr. Sweet.

Turning first to both plaintiffs' simple negligence claims, we conclude that Metrou, Moisan, and Cugell provide no evidence of causation. In some instances, Lewis and Livingston grossly mischaracterize the content of the cited testimony. Metrou and Cugell, for example, both stated explicitly that hydrogen sulfide was *not* the cause of various respiratory injuries alleged in this case. Lewis and Livingston also point to testimony that arguably would help them prove the *other* elements of negligence at trial; but of course Lewis and Livingston must first survive summary judgment. To do so, they must present evidence of causation, which they still have not done, making summary judgment appropriate on the negligence claims brought by both of them.

Finally, we consider other potential causation evidence relative to Livingston's claim for negligent infliction of emotional distress. Livingston argues that statements made by Dr. Sweet, an expert retained by CITGO to testify concerning Livingston's psychological condition, provided the necessary evidence of causation. In his deposition, Dr. Sweet, a clinical psychologist specializing in neuropsychology, stated that the incident "did cause [Livingston] some anxiety." He found that this anxiety was "relatively mild" and did not interrupt Livingston's daily activities. He noted that she had continued to work, but "that she may go back and double-check somebody else's having made [her work area] safe." Based on the timing of the events and Livingston's statements, Sweet opined that

Livingston's cautiousness was related to the hydrogen sulfide exposure. He concluded by saying the "level of anxiety that she experiences now [probably] is not diagnosable" and did not warrant care or clinical help.

In granting summary judgment, the district court acknowledged Livingston's "mild anxiety" but concluded that Dr. Sweet "did not find [that] Livingston suffered from any psychological disorders as a result of the incident." It appears that the court, by granting summary judgment for lack of causation despite this evidence, required a more substantial injury than the one diagnosed by Dr. Sweet for a claim for negligent infliction of emotional distress to survive. The district court moved beyond the issue of causation and considered the implicit question contained therein: whether the caused injury--here, mild anxiety--was compensable. The district court concluded that it was not, and we agree.

Implicit in causation is the existence of a compensable injury. A cause without an effect is not actionable under any form of negligence law. The Illinois Supreme Court has not addressed directly the magnitude of emotional injuries required for a claimant to recover on a claim for negligent infliction of emotional distress. A review of decisions by the Appellate Court of Illinois, however, makes clear that emotional injuries must surpass a threshold severity to be cognizable. *See Hiscott*, 754 N.E.2d at 850 ("[T]o prevent trivial or fraudulent claims, . . . recovery for negligently inflicted emotional distress should . . . be provided only for 'serious' or 'severe' emotional injury."); *Majca v. Beekil*, 289 Ill. App. 3d 760, 682 N.E.2d 253, 255, 224 Ill. Dec. 692 (Ill. App. Ct. 1997) (requiring "medically verifiable

manifestations of severe emotional distress" to limit false or magnified claims and concluding that plaintiff's reasonable fears were "not severe enough to justify compensation through the courts"); *Robbins v. Kass*, 163 Ill. App. 3d 927, 516 N.E.2d 1023, 1027-28, 114 Ill. Dec. 868 (Ill. App. Ct. 1987) (concluding that "crying, sleeplessness, increased migraine headaches and upset feelings" were not sufficiently serious forms of emotional injury to merit recovery for claims of negligent infliction of emotional distress); *cf. Buckley v. Jones Truck Lines, Inc.*, 778 F. Supp. 449, 452 (N.D. Ill. 1991) (recognizing that Illinois law requires the plaintiff in a negligent infliction of emotional distress action to demonstrate "severe emotional distress" but declining to find lack of severity as a matter of law).

In *Allen v. Otis Elevator Co.*, 206 Ill. App. 3d 173, 563 N.E.2d 826, 150 Ill. Dec. 699 (Ill. App. Ct. 1990), plaintiffs alleged emotional injuries suffered as the direct victims of an elevator breakdown in Chicago's John Hancock Building. *Id.* at 828-29. Plaintiffs claimed that as a result of being trapped in a crowded elevator somewhere near the Hancock Building's ninety-fifth floor, they suffered "continued distress, nervousness and sweaty palms when on elevators, . . . fears of heights or crowds, and, although they have taken elevators and airplanes since the incident, they have taken some actions to avoid taking elevators or using airplanes as a means of transportation." *Id.* at 833. A jury ruled in favor of the plaintiffs at trial, but the state appellate court concluded that the plaintiffs' alleged injuries were not severe enough to merit that conclusion and ordered a judgment notwithstanding the jury's verdict. *Id.* at 834.

As support for imposing a severity threshold, the *Allen* court cited the state's requirement of physical illness or injury prior to recovery for emotional distress. *Id.* at 833 ("[T]he physical illness or injury requirement indicates a desire to permit compensation only in cases involving serious emotional disturbance." (citing *Robbins*, 163 Ill. App. 3d 927, 516 N.E.2d 1023, 114 Ill. Dec. 868)). Although the Illinois Supreme Court has subsequently disavowed the physical injury requirement, *see Corgan*, 574 N.E.2d at 609; *see also Buckley*, 778 F. Supp. at 452, many *post-Corgan* opinions continue to embrace the threshold requirement of a severe emotional injury, *see Buckley*, 778 F. Supp. at 452; *Hiscott*, 754 N.E.2d at 850; Majca, 682 N.E.2d at 255.

Furthermore, we believe other policies underlying a severity threshold remain valid. It would be anomalous, for example, to require severe injury for a claim of *intentional* infliction of emotional distress but not for emotional distress that is caused by mere negligence. *See Allen*, 563 N.E.2d at 834; *Robbins*, 516 N.E.2d at 1027. In addition, the courts must have some mechanism, in situations such as this, to avoid wasting judicial resources on meritless claims.

In *Corgan*, the Illinois Supreme Court stated that it "[had] not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress." 574 N.E.2d at 609. Nor have we. We agree that any claims of even arguable merit must be given to the jury to consider. But we also recognize our continued obligation to avoid wasting the time and resources of our judicial system. *See Celotex Corp.*, 477 U.S. at 327 (noting that summary judgment has become the

principal tool "by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources"). When, as here, a claim for negligent infliction of emotional distress so clearly falls below the threshold requirement of a severe emotional injury, we will not hesitate to dismiss it at the summary judgment stage. We conclude that Livingston's injury--mild anxiety that causes her to recheck her work, but that only minimally interferes with her everyday life and for which she has not sought treatment--does not rise to the level of severity required under Illinois law for an emotional injury to be compensable in a claim for negligent infliction of emotional distress.

III. CONCLUSION

We GRANT the plaintiffs-appellants' motion to strike PDV America, Inc. and CITGO Lemont Refinery as parties to this case. As to all other claims raised by either Lewis or Livingston, we AFFIRM the district court's order granting summary judgment in favor of CITGO.

Footnotes

1 Pursuant to briefs submitted by the parties on a separate jurisdictional question identified by the court, we grant the uncontested motion of plaintiffs-appellants to strike as parties PDV America, Inc. and CITGO Lemont Refinery, both of which were listed as defendants in the court below. PDV America, Inc. was never served in the lower court, and CITGO Lemont Refinery is not a legal entity and therefore incapable of

being sued. This leaves CITGO Petroleum Corp. as the sole remaining defendant-appellee.

2Only because we are required to construe the evidence in the light most favorable to the nonmoving party, *see Alexander*, 263 F.3d at 680, do we grudgingly recognize a claim for negligent infliction of emotional distress from the face of Livingston's complaint. Nowhere in hundreds of pages of pleadings, filings, and briefings does Livingston state, in so many words, that she seeks recovery under this separate tort. Yet, based on the allegations and facts sprinkled throughout the record, we are able to piece together what appears to be a cognizable claim under such a theory. We note, however, that this construction pushes our obligation in construing the record to its absolute limit; part of that duty is not to build an anthill out of grains of sand scattered across a voluminous record.

3 In her complaint, Livingston states that she "suffered emotional trauma emanating from her being in the zone of danger and witnessing Lewis losing consciousness." While this certainly sounds like an attempt to satisfy the zone-of-danger test promulgated in *Rickey*, 457 N.E.2d at 5, it is missing necessary elements of a valid claim, including evidence of fear for Livingston's own safety. *See id.*

No. 06 C 4314

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MICHAEL LEWIS and TAMMY LIVINGSTON,
Plaintiffs,

v.

PDV AMERICA, INC., CITGO PETROLEUM CORPORATION, and CITGO LEMONT REFINERY,
Defendants.

January 30, 2008, Decided
January 30, 2008, Filed

Elaine E. Bucklo, United States District Judge.

MEMORANDUM OPINION AND ORDER

Defendant CITGO Petroleum Corporation ("CITGO") has filed a motion for summary judgment against plaintiffs Michael Lewis and Tammy Livingston (collectively "plaintiffs"). For the following reasons, the motion is granted.

I.

Plaintiffs were employed by a company that contracted with CITGO and other defendants to perform work at a refinery located in Lemont, Illinois. CITGO owned, operated, maintained and/or controlled that refinery. Plaintiffs allege that while they worked at the refinery

they were injured by breathing chemical fumes and that their injuries were caused by the negligent acts or omissions of CITGO and the other defendants.

The incident in question took place on March 11, 2001. Plaintiffs and CITGO workers were working on an elevated outdoor platform when they were exposed to hydrogen sulfide. Lewis fell on the platform as a result of a blast of gas. Plaintiffs and the CITGO workers then left the platform by climbing down. Lewis climbed down on his own.

Once on the ground, plaintiffs received treatment at the refinery from both CITGO emergency and local first response personnel. Plaintiffs were also taken by ambulance to the emergency room at a nearby hospital where they were physically examined. Plaintiffs returned to work the next day. In days following the incident, plaintiffs obtained follow-up medical care from Dr. Bess Metrou, a physician with a health practice contracted by CITGO to provide services for refinery employees. Specifically, Dr. Metrou examined plaintiffs on March 13, 15, and 20, 2001. Plaintiffs never sought any further medical treatment for any ailments related to the incident until a lawsuit was filed.

Both plaintiffs are cigarette smokers. As of 2003, Lewis had been a smoker for more than 15 years and Livingston for 10 years. To date, both plaintiffs continue to smoke half a pack of cigarettes a day.

Plaintiffs have described their injuries as follows. In May 2001, plaintiffs filed workers' compensation claims with the Illinois Industrial Commission ("IIC"). Plaintiffs were represented by counsel. In the IIC form, plaintiffs responded to the question "What part of the body was affected [as a result of the incident]?" as

follows: "[e]ntire body affected, unknown yet as to result." In undated answers to interrogatories, Lewis described his injuries as

> headaches and ongoing breathing difficulties including shortness of breath and difficulty breathing. Additionally, the plaintiff has suffered headaches, nausea and lack of sex drive. As further stated above, the plaintiff is soon to undergo testing to ascertain whether the breathing difficulties are caused by occupational asthma, or some like condition, and will defer to the experts relative to whether any condition causing the headaches or breathing difficulties is related to the accident.

Also in undated answers to interrogatories, Livingston described her injuries as

> severe headaches and ongoing breathing difficulties. As further stated above, the plaintiff is soon to undergo testing to ascertain whether the breathing difficulties are caused by occupational asthma, or some like condition, and will defer to the experts relative to whether any condition causing the headaches or breathing difficulties is related to the accident.

In August 2003, plaintiffs were examined by Dr. Jordan Fink who diagnosed Lewis with occupational asthma related to exposure to chemicals as a result of the incident, and Livingston with "a bronchitic problem" and potentially a "sinus disease." Plaintiffs were also examined by Dr. Norman Kohn, a neurologist and

psychiatrist, who diagnosed Lewis with persistent headaches and impaired concentration, and Livingston with persistent headaches and a mood disorder, possibly bipolar disorder. Dr. Kohn also opines that Livingston "very likely suffered posttraumatic stress disorder" immediately after the incident.

II.

In moving for summary judgment, defendants first challenge the admissibility of the deposition testimony of Dr. Fink and Dr. Kohn -- plaintiffs' expert witnesses. The admissibility of expert testimony is governed by Fed. R. Evid. 702, which reads

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

For expert testimony to be admitted under Rule 702, the movant must establish that the expert testimony is both reliable and would assist the trier of fact in understanding the evidence or determining a fact at issue in the case. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-91, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The primary purpose of Rule 702 is to avoid

confusing and unreliable expert testimony. *See id.* at 592; *Loeffel Steel Prods., Inc v. Delta Brands, Inc.*, 372 F. Supp. 2d 1104, 1110 (N.D. Ill. 2005).

With respect to Dr. Fink, defendants challenge both his qualifications and methodology. Dr. Fink is a medical doctor who is an internist with specialty in allergies. Defendants take issue with his lack of training and experience in toxicology (the study of poisons) or epidemiology (the study of disease) and point out he has testified that he only spent about half an hour conducting research on the effects of human exposure to hydrogen sulfide. Defendants also challenge Dr. Fink's methodology as unreliable and uninformed, for he did not review plaintiffs' medical records predating the incident or have pertinent information about the concentration of hydrogen sulfide in plaintiffs' exposure. Ultimately, they argue Dr. Fink's opinions are speculative and based only on plaintiffs' own self-reported symptoms and fail to provide evidence of general or specific causation. Defendants raise similar objections with respect to Dr. Kohn's methodology.

Plaintiffs fail to respond to defendants' objections to the admissibility of these experts' testimony under *Daubert*. Instead, plaintiffs simply argue that I must construe all facts in the light most favorable to them in light of FED. R. CIV. P. 56. This misses the point, because plaintiffs cannot rely on inadmissible evidence in order to defeat a motion for summary judgment. *Schindler v. Seiler*, 474 F.3d 1008, 1010 (7th Cir. 2007) (citing *Rogers v. City of Chicago*, 320 F.3d 748, 751 (7th Cir. 2003)). Furthermore, as the proponents of expert testimony, it is plaintiffs' burden to establish the proposed testimony is reliable and would assist the trier of fact in understanding the evidence or

determining a fact at issue in the case. *See Daubert*, 509 U.S. at 589-91; *Drebing v. Provo Group, Inc.*, 519 F. Supp. 2d 811, 2007 WL 2982224, at *2 (N.D. Ill. Oct. 11, 2007); *TRW Title Ins. Co. v. Sec. Union Title Ins. Co.*, 890 F. Supp. 756, 758 (N.D. Ill. 1995). Plaintiffs have not met this burden. Accordingly, I will not consider this testimony in deciding the motion for summary judgment.

III.

Summary judgment is only appropriate where the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Steen v. Myers*, 486 F.3d 1017, 1021 (7th Cir. 2007) (citing FED. R. CIV. P. 56(c)). I must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). I do not make "credibility determinations, weigh the evidence, or decide which inferences to draw from the facts." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). "[I]f the evidence is such that a reasonable jury could return a verdict for the nonmoving party," summary judgment should be denied. *Anderson*, 477 U.S. at 248.

Defendants move for summary judgment on the grounds that plaintiffs cannot show causation. In order to make a prima facie case for negligence under Illinois law, plaintiffs bear the burden of establishing the existence of a duty, a breach, proximate causation, and damages. *See, e.g., Ehrhart v. Lockformer Co.*, No. 02 C 7068, 2005 U.S. Dist. LEXIS 15845, 2005 WL 1869731, at *1 (N.D. Ill. Aug. 2, 2005) (Zagel, J.) (citation

omitted); *see also Cunis v. Brennan*, 56 Ill. 2d 372, 374 308 N.E.2d 617, 618 (Ill. 1974). It is plaintiffs' burden to set forth concrete evidence demonstrating the existence of a question of material fact with respect to causation; speculation or remote possibilities will not do. *See Ehrhart*, 2005 U.S. Dist. LEXIS 15845, 2005 WL 1869731, at *1; *see generally Jenkins v. Heintz*, 124 F.3d 824, 831 (7th Cir. 1997) (citing *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1127 (7th Cir. 1996)); *Avery v. Mapco Gas Prods., Inc.*, 18 F.3d 448, 453-54 (7th Cir. 1994) (citing *Schamel v. Textron-lycoming*, 1 F.3d 655, 657-58 (7th Cir. 1993)). "Under Illinois law, to serve as the sole basis for a conclusion that an act was the proximate cause of the plaintiff's injury, an expert must be able to testify with a reasonable degree of medical certainty that proximate cause existed." *Wintz v. Northrop Corp.*, 110 F.3d 508, 515 (7th Cir. 1997); *see also Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904-05 (7th Cir. 2007) (summary judgment was appropriate in light of absence of "expert evidence" in support of causation theory aside from the "mere existence of a temporal relationship" between alleged injurious act and onset of symptoms); *Goffman v. Gross*, 59 F.3d 668, 672 (7th Cir. 1995) (plaintiff failed to show causation in the absence of expert testimony because "the medical effects of second hand smoke [were] not within the ken of the ordinary person"); *Porter v. Whitehall Labs. Inc.*, 9 F.3d 607, 611-12 (7th Cir. 1993) (summary judgment was appropriate in light of absence of expert testimony on causation for negligence action); *Kirk v. Nat'l Railroad Passenger Corp.*, No. 06 C 2169, 2007 U.S. Dist. LEXIS 45699, 2007 WL 1832115, at *1-2 (N.D. Ill. June 25, 2007) (Aspen, J.); *Wroble v. The Lockformer Co.*, No. 02 C 4992, 2006 U.S. Dist. LEXIS 25925, 2006 WL 695254, at *1-2 (N.D. Ill. Mar. 17, 2006)

(Zagel, J.); *Ehrhart*, 2005 U.S. Dist. LEXIS 15845, 2005 WL 1869731, at *1-2.

Plaintiffs argue the testimony by defendants' own experts, Dr. Jerry Cugell and Dr. Jerry Sweet, and the treating physician, Dr. Metrou, preclude summary judgment in this case. (Pl. Br. at 7.) [1] Dr. Cugell only examined and provided a medical opinion concerning Lewis; he testified that any pulmonary discomfort or irregularities experienced by Lewis are the result of smoking - not exposure to hydrogen sulfide or another gas. In turn, Dr. Sweet examined and provided a medical opinion concerning Livingston's psychological condition; he testified Livingston does not suffer from post-traumatic stress disorder, that she is fully capable of functioning on a daily basis and, at most, Livingston suffered from "mild anxiety" as a result of the incident which manifests itself today in Livingston's insistence in double-checking all her work equipment because of safety concerns. In short, he did not find Livingston suffered from any psychological disorders as a result of the incident. Dr. Metrou testified that her March 2001 examinations of plaintiffs, which included physical and neurological examinations, x-rays, and blood tests, did not reveal any injuries or abnormalities in plaintiffs' respiratory systems. Lewis complained of back pains during the initial visit and she prescribed Tylenol. Dr. Metrou acknowledged that within a few days after the incident, Lewis complained of generalized body aches, occasional dizziness, shortness of breath, an irritated throat, a sparse cough, nausea and vomiting, and loose stools. However, Dr. Metrou also concluded that Lewis' complaints were not related to the hydrogen sulfide exposure because they occurred days after the exposure. (Ex. M, Metrou Tr. at 83.) Both Dr. Metrou

and Dr. Cugell testified that injuries related to exposure to hydrogen sulfide manifest at the time of the exposure, not later in time.

Plaintiffs' have not set forth evidence demonstrating the existence of a triable issue of material fact with respect to causation. First, plaintiffs fail to set forth expert testimony in support of their causation theory, by failing to establish the admissibility of such testimony. The medical effects of hydrogen sulfide exposure are not within the knowledge of the ordinary person. *See Goffman*, 59 F.3d at 672; *Porter*, 9 F.3d at 612; *Kirk*, 2007 U.S. Dist. LEXIS 45699, 2007 WL 1832115, at *1-2; *Wroble*, 2006 U.S. Dist. LEXIS 25925, 2006 WL 695254, at *1-2; *Ehrhart*, 2005 U.S. Dist. LEXIS 15845, 2005 WL 1869731, at *1-2. Second, none of the defendants' experts' testimony provides evidence of causation. Although defendants' witnesses do acknowledge that plaintiffs were potentially exposed to hydrogen sulfide, none of them concluded that was the cause of any of plaintiffs' purported injuries. Accordingly, plaintiffs' reliance on this testimony in opposition to defendants' motion for summary judgment is misplaced. Plaintiffs have failed to set forth admissible evidence creating a triable issue with respect to causation and, therefore, defendants' motion for summary judgment is granted.

III.

For the foregoing reasons, defendants' motion for summary judgment is granted. Defendants' motion for partial summary judgment on punitive damages is denied as moot.

/s/ Elaine E. Bucklo

Elaine E. Bucklo

United States District Judge

Dated: January 30, 2008

Footnote

1 Plaintiffs' response to defendants' statement of material fact fails to comport with local rule 56.1(b)(3)(B) because it does not contain any specific references to the record when identifying a disagreement.

No. 06 C 4314

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

LEWIS ET AL, Plaintiffs, v. PDV AMERICA, INC., ET AL Defendants.

Filed 1/30/2008

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion for summary judgment is granted. Defendants' motion for partial summary judgment on punitive damages is denied as moot.

s/Mathew P. John, Deputy Clerk

Filed 7/23/09
No. 08-1483

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL LEWIS and TAMMY LIVINGSTON,
Plaintiffs-Appellants,

v.

CITGO PETROLEUM CORPORATION,[1]
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 06 CV 4314--Elaine E. Bucklo, Judge.

Before RIPPLE, KANNE, and TINDER, Circuit Judges.

ORDER

On consideration of the petition for rehearing and rehearin en banc, no judge in active service has requested a vote on the petition for rehearing en banc and the judges on the panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing en banc are DENIED.

Footnote

*Judge Flaum did not participate in the consideration of this petition for rehearing.